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No. 89-1332

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., PETITIONERS

v.

HAITIAN REFUGEE CENTER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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The jurisdictional issue in this case has profound significance for the administration of the immigration laws. The issue has divided the circuits and has had serious consequences, unintended by Congress, for INS's allocation of resources. Respondents provide no adequate justification for this Court not to resolve that issue.

1. Unlike the court of appeals, respondents at least address the broad language of IRCA, 8 U.S.C. 1160(e)—language that precludes judicial review of "any determination respecting an application for adjustment of status" except in the context of court of appeals review of an order of deportation. But respondents' contention—that this preclusion is subject to an exception for challenges to an asserted "pattern and practice" of conduct by INS—is incorrect as to both the individual applicants and the organizational plaintiffs that filed the complaint in this case. Although most of respondents' arguments on these issues are discussed in our petition, some points warrant a further response.

a. *The individual respondents*. Respondents contend (Br. in Opp. 11) that their due process claims would not be cognizable in review of a deportation order because INS has "failed to provide for an administrative procedure which would vest exclusive jurisdiction in the court of appeals" under 8 U.S.C. 1105a. That argument cannot be squared with the plain text of IRCA.[1] In any event, respondents are wrong about the scope of review under Section 1105a; the inability of an immigration judge or the Board of Immigration Appeals to review denials in the Special Agricultural Worker (SAW) program does not preclude the courts of appeals from reaching such issues. Cf. *INS* v. *Chadha*, 462 U.S. 919, 938 (1983) (Section 1105a comprehends "all matters on which the validity of the final order [of deportation] is contingent").[2]

Respondents also speculate (Br. in Opp. 10-11) that their due process claims could not be addressed in the deportation context because the administrative review mechanisms provided under IRCA would not create a proper record for the court of appeals. But both the district court and the court of appeals discussed the need for translators, witnesses, and particularized records of denials at SAW interviews without adverting to any item of evidence that would have been unavailable in a proceeding under Section 1105a. Pet. App. 14a-17a, 49a-52a. Moreover, if a court of appeals found it necessary to amplify a record in order to adjudicate a constitutional claim, it could accomplish that by remanding the

[1] IRCA expressly states that "[t]here shall be judicial review of * * * a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title." 8 U.S.C. 1160(e)(3)(A).

[2] *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), cited by respondents (Br. in Opp. 12), is no more relevant here than it was in *Chadha*. See 462 U.S. at 938-939.

case to the agency. Cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).[3]

Finally, with respect to the claims of individuals, respondents assert (Br. in Opp. 10) that it "strain[s]" the statutory language to apply the words "a determination respecting an application" to the conduct of immigration officials in thousands of interviews. But respondents' complaint simply packages together many INS actions in individual cases and relabels those actions as a "policy." Respondents do not contend that each SAW applicant can assert his or her particular due process challenge in district court without following the course of judicial review prescribed by Congress. Yet, they fail to explain why the language of the statute is rendered inapplicable simply because many such claims are joined together in a class action.[4]

b. *The organizational respondents*. Respondents contend (Br. in Opp. 14-15) that whatever limitations are imposed on individual SAW applicants, the organizational respondents are free to sue in district court on the same legal claims. But this Court rejected a strikingly similar argument

[3] Respondents' failure to acknowledge that their due process claims are ultimately reviewable in the court of appeals leads to their misplaced reliance on *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). Br. in Opp. 13. As we explained in our petition (at 17 n.11), this case, unlike *Michigan Academy*, is *not* a case in which the only alternative to district court review of respondents' constitutional claims is total preclusion of review.

[4] Although respondents do not deny that the complaint sought the reopening of individual cases, respondents note (Br. in Opp. 16-17) that the specific paragraphs of the injunction appealed by the INS ordered only prospective relief. But respondents overlook that our submissions in the court of appeals called into question the jurisdiction of the district court over the entire case. See Gov't C.A. Br. 14 ("[T]he district court lacks jurisdiction over the complaint."); Gov't C.A. Reply Br. 2. Likewise, the court of appeals evidently understood that the district court's jurisdiction over the entire case was at issue. Pet. App. 9a-11a.

in *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984), explaining that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." 467 U.S. at 349. Pursuant to that principle, district courts are not authorized to hear the claims of the organizational respondents in the SAW program because such review would frustrate Congress's purposes in cabining review at the instance of individual applicants. See Pet. 18-19.

Nor do respondents advance their cause by noting (Br. in Opp. 14) that the organizational respondents have alleged Article III injury-in-fact under *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). That is not the dispositive question here. Rather, the issue is whether Congress intended to authorize the organizational respondents to bring suit based on the legal claims of SAW applicants. Although respondents insist (Br. in Opp. 15) that the claims of the organizational plaintiffs do not duplicate the claims of applicants, they are unable to point to any legal claim that the organizational respondents alone can advance. The *injury* that the organizational plaintiffs allege does differ from the injury alleged for the individual SAW applicants, but that is not relevant to the inquiry under *Block*; that case directs attention to the nature of the *legal claims* asserted. See *Block*, 467 U.S. at 348 (noting that it would "disrupt" the statutory scheme to allow consumers to assert in court "precisely the same exceptions" that handlers must assert administratively).[5]

[5] Contrary to respondents' view (Br. in Opp. 15), the status of respondent Migration and Refugee Services as a "qualified designated entity" (see Pet. 6 n.4) is of no assistance in establishing its right to sue. Indeed, Congress's careful description of the functions of a "qualified designated entity" in IRCA itself, without authorizing such an entity to litigate the claims of aliens, constitutes powerful evidence that no such role was intended.

2. Respondents next argue (Br. in Opp. 17-22) that Congress intended to allow broad-based constitutional challenges in district court, notwithstanding the restrictive approach to judicial review manifested in IRCA. As an initial matter, we disagree with respondents' implication (Br. in Opp. 18) that the requirement of "clear and convincing evidence" to overcome the presumption of judicial review applies when the question is not *whether* Congress intended to allow review, but only *where* and *when* review shall be had. Cf. *Florida Power & Light Co.* v. *Lorion*, *supra* (resolving the question whether review was available in the district court or in the court of appeals without discussing the presumption against preclusion of review). As to individual SAW applicants, the issue before this Court falls into the latter category.

In any event, the statute and its background make clear that judicial review of the claims of SAW applicants is authorized only in the courts of appeals, and is prohibited elsewhere. Review at the instance of the organizations would undermine Congress's intention to "[r]estrict[ ] judicial review to the context of an order of exclusion or deportation." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 99 (1986). Contrary to respondents' assertion (Br. in Opp. 19), Congress's failure to preclude *all* judicial review, as the Senate bill provided, does not undercut the significance of the sharp limitations on review in the legislation that the House and the Senate actually passed.

Respondents assert that Congress's *only* purpose in limiting judicial review was to avoid a flood of individual actions. Therefore, they conclude, that purpose would not be thwarted by allowing district courts to have jurisdiction over sweeping class actions like this one. Br. in Opp. 18-19. But if judicial review in individual legalization cases threatens to disrupt INS and to burden the courts, the disruptive potential of class action litigation magnifies those

problems many times over.[6] It is inconceivable that Congress carefully limited judicial review of individual claims, only to leave a gaping hole for far more intrusive and time-consuming district court actions like this one.

As in the courts below, respondents argue (Br. in Opp. 19-20) that the reasoning expressed in a handful of court of appeals decisions embracing a "pattern and practice" exception to 8 U.S.C. 1105a[7] also applies to IRCA. But IRCA incorporates only the specific form of review (review of final deportation orders) created by Section 1105a; Congress gave no indication in IRCA that it meant to recognize any *exceptions* to that form of review. On the contrary, the IRCA provision, fairly read, *precludes* application to the SAW and legalization programs of the debatable "pattern and practice" decisions under Section 1105a.[8]

3. In our petition, we explained that this Court's review was necessary to resolve the direct conflict between the decision of the court of appeals here and that of the D.C. Circuit in *Ayuda, Inc.* v. *Thornburgh*, *supra*. Pet. 25-28.[9] Respondents struggle unsuccessfully to distinguish the two cases. Br. in Opp. 22-26. First, respondents note that this case involves provisions applicable to the SAW program, while *Ayuda* involves the counterpart provisions applicable to the general legalization program. Given the contemporaneous enactment of the two provisions in the same statute, and their virtually identical language, this distinction is not just "technical[ ]," as respondents themselves admit (Br. in Opp. 23), it is wholly without significance.

Second, respondents observe that this case involves due process claims, while *Ayuda* involves an APA challenge to a rule. But neither the Eleventh Circuit here, nor the D.C. Circuit in *Ayuda*, relied on any such distinction. Indeed, the court of appeals in this case treated the two types of claims identically, ruling in the same sentence that the district court had jurisdiction over respondents' "statutory and constitutional" claims. Pet. App. 11a.[10]

Respondents also make the curious argument that, assuming a conflict exists, this Court's resolution of it would be both "premature" and too late in the lifespan of the legalization programs to serve any useful purpose. Br. in Opp. 8, 25. Quite apart from the inconsistency of these two assertions, respondents are wrong on both counts. Although several other cases now pending on appeal present essentially the same legal issue as we present here, the issue has

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[6] The record here bears out this threat: the INS has been engaged in protracted litigation over document discovery affecting thousands of applications (see Pet. 8 n.6); it has been compelled to reopen and review over 20,000 individual claims; and it has been ordered to hire and train personnel to comply with the court's injunction to provide translators. Many other cases, based on the same jurisdictional theory, have been filed around the country to challenge the details of the legalization programs; these cases have also plunged the district courts into an unaccustomed role of closely supervising an agency's administration of a massive program, often on a level of minute detail. Pet. 28-29; see also *Ayuda, Inc.* v. *Thornburgh*, 880 F.3d 1325, 1337 (D.C. Cir. 1989), petition for cert. pending, No. 89-1018.

[7] See *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982), and *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985).

[8] Respondents err in arguing (Br. in Opp. 20) that IRCA's limitation-of-review language finds a counterpart in Section 1105a itself. Section 1105a only identifies the "exclusive" forum for challenging *final* orders of deportation; unlike IRCA, it does not purpose to regulate (let alone bar) review of other types of determinations.

[9] The petitioning legalization organizations in *Ayuda* share our view that the two cases are in conflict. Pet. at 10-13 in *Ayuda, Inc.* v. *Thornburgh*, No. 89-1018.

[10] Moreover, respondents' only reason for drawing a distinction between the two theories—that a stronger showing must be made to *preclude* judicial review of constitutional claims—simply does not apply in this case. As we have explained, IRCA *authorizes* review of respondents' due process claims in the context of a deportation order. See Pet. 16-17.

already been thoroughly aired in the lower courts (see, *e.g.*, the majority and dissenting opinions in *Ayuda*) and is ripe for consideration by this Court.

Moreover, we strongly disagree that the jurisdictional issue is not worthy of this Court's attention because phase one of the legalization programs is nearly over. The litigation over phase one is continuing, and the pending cases raise issues of consequence to INS's ability to move towards completion of its statutory responsibilities. In addition, we do not share respondents' sanguine prediction (Br. in Opp. 29) that phase two of the legalization programs (adjustment to permanent residence) will not generate similar legal challenges.

4. Finally, respondents' attempt (Br. in Opp. 26-30) to downplay the practical significance of this case is misguided.

a. As an initial matter, respondents speculate that the case may become moot before this Court could decide the jurisdictional issues presented in our petition. This fear has no substantial basis.

The pertinent provisions of the injunction require INS to afford applicants the opportunity to present witnesses, to provide translators, and to particularize evidence at interviews of SAW applicants. Although INS has completed the first interview of all SAW applicants within the jurisdiction of the Eleventh Circuit, compliance with the district court's injunction will require INS to afford the opportunity for second interviews to a large number of additional applicants.[11] INS estimates that the process of adjudicating all SAW applications, including reinterviews, will not be completed before September 30, 1991. The district court's injunction will continue to have operative effect throughout that process.[12]

[11] The INS has advised us that, at present, it has identified 3,554 SAW applicants who will be offered new interviews. The INS also believes that upon further review, it will be required to offer a new interview to some 6,500 additional SAW applicants.

[12] Respondents state, without support, that the injunction does not apply to the reinterview process. Br. in Opp. 26-27 n.24. We do not agree; its literal scope covers all SAW applicants being interviewed. See Pet. App. 57a.

Equally important, respondents themselves do not regard the case as moot until INS's full compliance with the injunction is assured. In a June 1989 status report, respondents advised the district court that upon issuance of the court of appeals' mandate, the district court "must decide what further relief may be appropriate with respect to the failure to provide adequate translation at the interviews, failure to make a record of the interview, failure to allow applicants to present witnesses on their behalf[,] and whether or not a hearing on the merits is required with respect to these issues."[13] In light of respondents' commitment to litigate INS's continuing compliance with the outstanding injunction, this controversy is not approaching mootness.

b. Respondents also suggest (Br. in Opp. 28) that the resolution of the jurisdictional issue raised in this case will require consideration of 8 U.S.C. 1329, which was not expressly included in the question presented in our petition. We did not identify that jurisdictional provision in the question presented because neither the district court nor the court of appeals relied on it. Nevertheless, in accordance with respondents' statement of the question presented (see Br. in Opp. (i)), we agree that the question should be clarified to embrace it.[14] Section 1160(e) bars district court review whether the asserted source of jurisdiction is 28 U.S.C. 1331 or 8 U.S.C. 1329; as our petition suggested, the same principles apply to both grants of general jurisdiction. Pet. 25 n.18.[15]

[13] Plaintiffs' Status Report at 3, *Haitian Refugee Center, Inc. et al.* v. *Nelson*, No. 88-1066-CIV-Atkins, (filed June 23, 1989).

[14] Cf. *INS* v. *Abudu*, 485 U.S. 94, 103-104 (1988) (relying on petitioner's reply memorandum clarifying the question presented).

[15] Respondents' quotation of 8 U.S.C. 1329 to suggest that it affords jurisdiction "[n]otwithstanding any other law" (Br. in Opp. 28) is misleading. The *first* sentence of Section 1329, which grants juris-

c. Respondents urge that the question presented lacks continuing importance because litigation over the legalization programs is winding down. In our petition, we described the far-reaching relief ordered in a number of ongoing legalization cases, including extension of the application deadline and judicial creation of new classes of persons eligible for immigration benefits. Pet. 28-29. The ability of courts to fashion those particular forms of relief, like the ones at issue here, depends on the validity of the theory of district court jurisdiction adopted by the courts below. Moreover, if respondents are correct in their assertion (Br. in Opp. 20) that the principles of *Haitian Refugee Center* v. *Smith*, *supra*, and *Jean* v. *Nelson*, *supra*, apply here, this case will have significance for litigation under the immigration laws—and indeed under other statutes as well—long after the legalization programs have been completed. This case thus presents an issue of broad importance that warrants this Court's review.

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For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

MAY 1990

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diction to the district courts, does not include the quoted language. It states: "The district courts of the United States have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this SUBCHAPTER ~~title~~." The language quoted by respondents appears in the *third* sentence, which deals only with venue in "prosecutions or suits" brought by the United States.

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